1. acquisition of rights and property:
2. estates and land, systems of estates: once I’ve acquired it, what am I entitled to?
3. transfer of property (deeds, mortgage, title insurance)
4. restrictions on property use

Who has the rights and how do we allocate them?

**Acquisition of rights and property**

What is property?
A sense of entitlement, defines relationship between people and things.
Rights → sell, use, destroy, ability to exclude others.

**Acquisition of property other than by purchase**
- Discovery; Capture; Find; Creation

**Discovery**

**Johnson v. M’Intosh**

**Rule:** The principle of converting an already inhabited country by conquest forces original inhabitants to be considered mere occupants and entitles them to nothing.
    * generates more wealth for society; Justice Marshall wanted to maintain what he believed was a “practical reality” rather than challenging it.

**First-in-time**
- Scarcity: forces people to act quickly and take advantage of resources
- Efficiency: FIT provides for security and certainty
- Public peace: we are not wasting resources trying to take/prevent people from taking something from someone else → put our resources to a more productive use.
- Allows possessor and non-possessor to organize their affairs and engage in transactions that they (and society) see fit: order our affairs
- Creates incentive to be productive
  - We know we can keep what we have and what we have done won’t be wasted.
  - Forces us to do something (SCARCITY)
- A private property system helps settle our society
- Possession is a symbol that tells others what you claim
- **Criticisms**
  - There is nothing ethical or moral about it
  - Just b/c you grab something first does not mean you deserve it – what about people who have not had an equal opportunity to grab?
  - It protects an already entrenched status quo – they are always the first to grabs
  - Notions of security or efficiency come at the expense of fairness and justice

**John Locke: Labor theory of property**
- Original owner is one who mixes his labor with the property itself.
- each ind owns his labor and thus owns whatever he mixes with that labor, such as the land, making it his property.
- FIT: when you discover something, you cultivate it and MAKE IT YOURS
- Does not require anyone else’s consent.
• Occupancy possession is not good enough by itself → what did you do to become an occupier?

• Criticisms
  o HOW DO YOU EVER KNOW WHEN YOU HAVE DONE ENOUGH?
  o What about group efforts? How to divvy…
  o Person who labors a lot and then loses…
  o Person who labors a little but gets a lot…
  o What is the scope of the right?
  o What if we do not own our labor?

• Advantages
  o Economic efficiency: you keep that which constitutes the fruits of your labor

Capture
Pierson v. Post
Rule: He who physically captures the animal (more than wounding it) wins possession.
Dissent: role of norms and customs in this case should govern the law.
  • The pursuer should have property rights if there must be a reasonable likelihood of capture. The majority decision may make people lazy about hunting.

What is pursuit?
• Some kind of property interest in the object at hand (Did Pierson want the fox?)
• A reasonable likelihood that you will capture it
• Dissent from Post: If there is pursuit and a reasonable likelihood of capture then an ind has property rights.
  o Then there is notice of your intent
  o If the law recognizes mere possibilities as opposed to reasonable expectation then we will be too flooded with claims.
  o Reasonable likelihood perhaps is what we need to have done enough labor.

Rule of Capture
• Reduces the number of factors courts have to consider
• Advantages
  o We spend fewer resources making decisions in court
  o If parties know the likelihood of an outcome, they are less likely to fight it.
  o These rules help maintain peace and order
• Disadvantages
  o Notion of certainty: not having flexibility in this rule can lead to poor results.

Ghen v. Rich
Rule: Custom, as long as it is reasonable and valid, is a proper way to establish property rights as law.
Notes: there is efficiency in the preestablished customs of a community.
  • How does an individual get from marking a property to owning it?
  • The lance (of the whaler) serves as sufficient notice in this case.
  • In addition to efficiency, Rich still mortally wounded the whale and, based on Pierson, is thus entitled to it.

Why do we rely on customs?
• Custom allows us to effectively reach a goal.
• Custom may be aligned with a larger social interest
• Customs serves a greater public policy goal
• Customs are efficient (or at least effective)
• Local custom is more flexible – easier to change than asking courts to change it.
  o Narrowly tailored to experiences

**Disadvantages of relying on norms**
• Other social interests (third parties) that are not taken into account by customs of a social subset (externalities)
• Customs may lack ethical/moral grounding → no larger sense of right/wrong

**What is the role of possession and why does it matter?**
• Serves instrumental functions, such as catching whales or foxes
  **Notice** function: it must be **sufficiently clear act** to put the world on notice
  o Others must have consented → everyone must know the starting position and what others are claiming
  o Facilitates trade and maintains efficiency (by asserting title)
  **Reconcile the two**
  o Clear Act principle: those acts that put the world on notice also require enough labor to satisfy Lockian Labor Theory
  o The act of giving notice is labor in itself and should be rewarded.
• What is a sufficiently clear act?
  o See Pierson and Ghen – must put the WORLD on notice
• Who is the appropriate audience for notice?
  o The local industry → sufficiently clear act is determined by norms/customs

**Wild animals**
• Constructive possession: wild animal is on somebody’s land, therefore owner of the land has constructive possession.
  o This discourages trespassing … ind would not hunt an animal onto another’s land for fear of losing it by this rule.
• Why we want to discourage trespass (PP):
  o It can lead to violence and we want to avoid that
  o In order to keep people off our land w/o permission we may want to build fences, moats → society would be better off if we use those resources (effort, time, money, etc) for other uses.
  o Incentive: if you put something to productive use, you should have security.
  o Prevents rewards for wrong-doing
• Relativity of title: property is a set of relationships among people relative to things.
• Notion of self-help
  o If Trespasser steals from Owner, can Owner just go and take it back?
  o We are anti-self-help…use the courts to negotiate a solution.
• Animus Riterndae: animals in the habit of returning
  o If a wild animal escapes from O, then O loses his property rights and the animal shall be owned by whomever takes it, unless:
• Animal has a habit of returning
  o Encourages domestication of wild animals by not only protecting the effort of the owner. Makes domestication easier b/c we can allow animals to roam and we don’t have to expend resources keeping a close watch on them all the time.

**Fugitive resources (oil, gas, water)**

- May collect underneath the properties of many people
  - People feel compelled to extract as much as possible as quickly as possible.
  - There may be an overuse of the resource
  - TRAGEDY OF THE COMMONS
- If you don’t drill, I will and then there will be nothing left for you, so even if you wanted to conserve now you feel compelled to drill.

**Externalities**

- When people take adv of resources w/o taking full account of who else is affected.
- PP: these costs or benefits that occur when a person engages in some activity that fall on or benefit some third party, besides the actor.
  - It is only an externality if the actor does not take them into account when deciding how much or whether to engage in an activity.
- **Why do we care about externalities?**
  - They can lead to inefficiencies \(\rightarrow\) inefficient allocation of resources. Society as a whole might be better off if we used resources in a different way.
  - Negative: may result in too much of an activity – there is some third party
  - Positive: there is too little of some benefit/activity
- **What do we do about externalities?**
  - Allocate property rights (give owner right to pollute or community right not to be polluted)
- **Coase Theorem**
  - Regardless of who you allocate the property right to, you will end up with the same result, SO LONG AS THERE ARE NO TRANSACTION COSTS.
  - The ultimate allocation of rights/entitlement does not depend on the initial allocation, so long as there are no transaction costs.
  - If right to clean air belongs to community and owner values polluting he will be willing to pay community as much as it costs, without impinging on his profits (if he makes $1000, he is willing to pay up to $999). If Owner has a right to pollute, and the value of clean air is worth $500 to the community, owner will not stop polluting b/c it is worth $1000 to him.
  - Economic implications are the same: someone is paying for the externalities. Wealth distribution effects.
- **Transaction costs**
  - Costs incurred in organizing a group to fight externalities.
  - Locating all members of the hurt group and organizing them, hiring lawyers, figuring out what the harm is, free-riders, etc.
- **Tragedy of the commons**
There is some resource to which no one has private property rights. The resources are owned in common by some community and there is no right to exclude or to be excluded from using the commons as you might desire.

Demsetz article
- There are likely to be many externalities, particularly negative.
- In a commons, each person enjoys the benefits of using it but only shares a portion of the costs. Costs spread over a large pool.
- **Overuse of the resource**: ex we cut down trees today that are so much more in the future b/c ind actors do not internalize costs of one tree.

Options (according to Demsetz)
- Community members get together and agree to protect the resource; common management; leave it locals and their standards.
  - Very difficult to get everyone together: transaction costs.
  - Works when you have a small community → people are concerned about reputation, don’t want to leave the community and be known as person who goes contrary to norms.
- Allocate property rights to each individual (PRIVATE PROPERTY)
  - Helps internalize previously external costs; individual will not engage in an activity when costs exceed benefits.
- Legislation or regulation: gvmt decrees what can/cannot be done.
- Gvmt could own the resource and allocate rights to its use.

Problems with the commons
- Overpopulation causes scarcity
- Gvmt programs help insure our welfare
  - Other people bear the cost of me having children

**Lobster Gangs of Maine**

**Radin: Property as Personhood**
- The hierarchy of personal property to fungible property
  - People define themselves re some properties, such as homes (should be afforded the highest degree of protection)
  - Fungible → money, gets least amount of protection.
- Property measures personhood and not utility
- PP: who decides what is proper self-constitution? Who decides the objective moral consensus?
  - re redistribution of wealth (such as taxes, homelessness, welfare)
  - there are some who value money as personhood, such as someone who grew up during the Depression.

**Goffman: Property in Mental Institutions**
- the process of owning and what it means to own something.
- People self-identify with things and focus on themselves as the thing itself.
- PP: it is not the thing that matters but the capacity to own.
- Owning: being able to use it and exclude others from using, controlling something else and thereby controlling one’s self, sense of autonomy, respect from others in the community.

**Friedman: Competitive capitalism (Diffusion of Political Power)**
Comp capitalism promotes political freedom by splitting power in the political and economic spheres. (unlike socialism where gov't owns all powers)

- Enables one kind of power to offset the other (checks and balances)

**Sundstein: Constitutional property rights**
- Power of the socialist gov't comes from right to give and take away property
- When citizens are dependent on good will of gov't, everything they have is a privilege, not a right.
- Right to property free from gov't interference is necessary for democracy.

### Acquisition by Find

#### Lost property
- Owners who lose their personal property retain their ownership rights unless they intentionally relinquish ownership to another.
- Finders have a right to possess lost objects with reference to everyone but true owner.
- Lost = owner unintentionally parts with his property and has no idea where it might be.
- Why is this the rule? (PP)
  - We don’t want too many resources dedicated to the safe-keeping of items, so we make sure owner maintains his claims.
  - FIT: original owner is first-in-time compared to everyone else
  - Sense of security in possessions
  - How do we know if this person is really the finder? Deal with that by making the first owner always the first owner.
- What if there is another person who is claiming possessory rights also?
  - Whoever owns the property on which the item was found has rights. → owns the property and therefore owns the item.
- Who might win between land owner and finder?
  - Land-owner had *constructive possession* of everything on premises
  - LO should win b/c he has control over everything on premises
  - LO should win b/c he has reasonable expectation that he owns everything.
  - Finder should win b/c LO may not have had any control over the item just b/c he owns the land…he may not have even known it existed.
  - Is the land public? If so, finder should win.
  - [distinction b/t private and public: there are private places within a public space, such as a mall.]

#### Abandoned property
- item is intentionally left → finder beats true owner
- how do we know if something is abandoned?
  - Owner intends to relinquish ownership and demonstrates that intent.
- Why do we do this?
  - needs to be some *certainty* – can’t give something up and keep going back for it.
  - Efficiency: if you’re not using it, someone else should make it productive.

#### Mislaid property
- Something intentionally placed in a particular place and then mistakenly left there.
• RULE: owner beats out everybody (like lost property) and owner of the land where the property was mislaid has possessory rights until owner comes back.
• Trying to facilitate the return of the mislaid item to the true owner, which is more likely if owner of land retains possession.
• [distinction b/t lost and mislaid]: property is generally mislaid in a nonpublic place

Armory v. Delamirie
Rule: The finder of a property, though he does not by such finding acquire absolute property or ownership, may keep it against all but the rightful owner.
Notes: creates disincentive to take things, as a second finder (high damage award)

McAvoy v. Medina
Rule: When property is left in a shop, it is not the right of the first-finder to take the property away, but rather the duty of the shop-owner to safe-keep it until some owner should claim it.

Acquisition by creation
Moore v. Regents of the University of California (Cal, 1990)
Rule: Physician is legally required to disclose facts material to a patient’s consent; liability based on existing disclosure obligations, rather than an unprecedented extension of the conversion theory, protects patient’s rights of privacy and autonomy without necessarily hindering research. (fid duty does not create disincentives to helpful research)
Notes: (PP)
• Role of the courts v. legislature in dealing with this issue
  o Should courts be thinking about it? Subject to referenda ⇒ let the people decide?
• Should our bodes be subject to the marketplace? Is treating body parts as property somehow dehumanizing and commoditizing us?
• Property is a bundle of rights – even if someone has a property interest in his/her body, does that mean you can sell/commercialize/give away parts?
• Changing circumstances, as a result of technology, can put pressure on the law in ways we previously thought were unimaginable.
• More on Moore v. Regents
  o Court majority finds for regents on conversion: no property right in one’s tissue; nothing was taken b/c he did not own it
    ▪ His cells constitute raw materials which the work of the researchers made valuable. They were not inherently valuable.
  o Still has cause of action for breach of fid duty. Duty b/c Moore was not given all the info about the value of his body parts when he consented.
  o Concurring justice: has problem w/ people selling their body parts for profit --- we don’t want to commodify the human body and subject it to the market.

Estates and Land, Systems of Estates

Estates and Land
• Property ownership can be divided over time.
• Rights to current possession and some point in the future
  o Present estates: right to current or present possession → fee simple, defeasible fee, life estates and leaseholds
  o Future estates: right to future interests is presently existing → possibility of reverter, reversion, right of entry, executor interest

• **Policies of property ownership**
  o Promote widespread ownership of property
  o Protect the autonomy of owners to use their land as they see fit (avoid control of “dead hand of the past.”)
  o Promote alienability (transferability) of land – by will, sale, etc.

• **Disaggregation vs. consolidation of property rights**
  o May want to change the use of land which is hard if it is tied up in restrictions
  o Hard for present possessor transfer land if transferee knows there are a lot of future possessors.
  o Reconsolidating property rights promotes alienability

**Systems of ownership/estate (four kinds)**
• **Fee simple**: largest estate and ownership can last forever → owner determines who gets property when he dies
  o **Fee simple absolute**: largest aggregation of rights re land; can last forever; can be inherited or pass on through will; alienable; restrictions on alienability are typically void; if you convey, it is presumed to transfer fee simple.

• **Defeasible fees**: can last forever but will terminate upon certain event named in the conveyance document (event may or may not happen).
  o Inheritable, divisable, can be given away by will, alienable → if the conveyance event happens at some point, defeasible fee terminates and ownership will transfer to whomever holds the future interest.
  o **Types of fee simple defeasible**
    ▪ **Fee simple determinable**: possibility of reverter (future interest): reverts in the grantor automatically when an event occurs
      • ends automatically in the happening of a stated event and transfers automatically
      • words to look for: as long as, during, while, unless … should be distinguished from motives of vendor (O to A for school is not a fee simple defeasible.)
    ▪ **Fee simple subject to condition subsequent**: (right of entry = future interest) invests in the grantor again if grantor exercises her right to take the land when the event occurs
      • allows grantor (not a third party) to reclaim party after event. SO LONG AS grantor asserts right to do so.
      • Trend is to allow rights to be transferable, conveyed, divised.
      • Ex: O to A to be used as park and when it is not O can take it.
    ▪ **Fee simple subject to executory limitation**: (executor interest = future interest) invests in third party after the condition occurs
      • Same as fee simple determinable with possibility of reverter EXCEPT that future interest belongs to third party
      • O to A for park but if not, then to B.
1. B’s executory interest becomes possessory automatically.
   - These future estates distinguish b/t interest in grantor that invest automatically *(possibility of reverter)* and those that come at behest of owner.
   - Difference b/t future interest in grantor and third party is RAP

2. **Life estates:** last for the life of the owner or the holder of the estate. When holder of estate dies, property passes on to the grantor *(future interest = reversion)* OR if it doesn’t go to grantor, it goes to 3rd party chosen by grantor *(future interest = remainder)*. Transferee can only keep it for the duration of the life of the estate holder, cannot transfer it.
   - **Reversion** in grantor or his heirs: transferee’s interest in the land is measured by the life of the holder of the estate → hard to transfer
   - **Remainder** in some third party
     - Ex: O to A for life and on A’s death, O/O’s heirs take possession in reversion.
     - Ex: O to A for life, then B (life estate in A, remainder in B)
     - Ex: O to A for life, then to B/B’s heirs if B survives A … remainder in B and a reversion in O.

3. **Types of vested remainders**
   - **Vested:** belongs to ascertainable persons and there are no conditions that must be first satisfied before remainder becomes possessory, except the death of the holder of the life estate.
     - **Absolutely or indefeasibly vested:** one that will not change; it is certain to become divestory in the future → you, as the holder of this remainder, will get it. O to A for life, then to B.
     - **Vested remainder subject to open/partial divestment:** remainder is held by a class of people that can increase (O to A for life, then children of B); courts may close the class when any member becomes entitled to distribution *(Rule of Convenience)* → don’t have to wait for every member.
     - **Vested remainder subject to divestment:** when the remainderman can be divested by the happening of a later event (O to A for life, then B but if B does not finish school, then to C … B has the vested remainder subject to divestment, C has executory interest)

4. **Contingent** → it belongs to unascertained person or when there is a condition that has to be satisfied for there to be a vested remainder (O to A for life, then to B if she graduates school … if B did not have any kids and nobody is ascertained); O to A for life then to the first child of B, remainder in the heirs of B is contingent b/c, technically, you do not have heirs until you die.)

5. **Leasehold:** the only non-freehold of the systems of estate → law of landlord/tenant
6. **Fee Tail:** (technically the fifth estate) → estate created by conveyance

**Waste**

- Main idea: A, holder of present estate, should not be able to use property in a way that interferes with the expectations of future interest
- Arises any time multiple people have a right to possession of property (tragedy of the commons)
  - **Bilateral monopoly:** only two people (holder of present estate and holder of future estate) → bargaining with no competition, both people are locked in and try to extract the maximum value for concession… inefficient
  - **Affirmative waste:** ruin the land by some act (ex: pollution)
o **Negative waste**: fail to take care of the land, thereby creating waste (ex: letting land fall by the wayside)

**Regulatory rules**
- promote alienability b/c that is consistent w/ respecting the autonomy of present land holders and promotes social welfare; if we restrict alienability, we lose efficiency
- **restrictions on new estates**: a restriction on creating on new estates in land … new estates deter alienability
- **prohibitions of unreasonable restraints on alienation**: promotes alienability -- restraints on alienation are usually void, if they restrain ability to transfer fee simples.
- **Restraint on alienation associated with life estates**:
- **ex-ante effects of the rule**: when dealing with a problem today with a specific group of people, we know how it will work out – but how will a different group respond?
- **Rule against perpetuities**:
  - Invalidates future interest at the time they’re created unless they are certain to vest, or fail to vest, within the lifetime of someone who’s alive, and in being, at the creation of the interest or no later than 21 years after her death.
  - Rule only applied to nonvested interests, which include: executory interests, contingent remainders and vested remainders subject to open
  - Does not apply to future interests held by grantor (considered already vested)
  - When is there a life in being? Look for a validating or measuring life – someone within whose lifetime, or 21 years after, the future interest is certain to vest if ever. If you cannot find one, interest is void.
  - **Reform**: the wait-and-see-doctrine: it may be possible that the interest does not vest but it may, in reality, also vest, so let’s just wait-and-see if it vests.
  - Ex: O to A for life, then to A’s first child to reach 21. validating life is A and we can prove that any one child can reach 21 after death of A.
  - Ex: O to A for life, then to A’s first child to reach 25. Remainder in this case is VOID b/c we cannot prove that A’s first child will reach 25 within 21 years after A dies. Assume all of A’s children died under age of 25 … no validating life. O to A for life, reversion to O.
  - **Unborn widow and fertile octogenarian**

**White v. Brown** (Tenn. 1977)
- **Rule**: The title is a fee simple onto White and Lide’s attempts to restrain alienation of the property must be declared void as inconsistent with the incidents and nature of the estate devised and contrary to public policy.

**Mountain Brow Lodge No. 82, Ind. Order of Odd Fellows v. Toscano** (Cal 1968)
- **Facts**: Deed is granted for second party, lodge, for the use of land in only one way and if it is not used in that way, the rights will revert to the grantors.
- **Rule**: This use restriction is allowable, though practically, it might have the exact same effect as a restraint on alienation.

**State v. Shack** (NJ 1971)
- **Rule**: No right to exclude in this case → title to real property cannot impinge on the civil liberties of those on your land (esp in the case of migrant workers, when they have no opp to get off the land and are powerless to protect/help themselves). The very intent of this gvmnt
program was to get on these lands and help these people. Necessity, private or public, justifies entry on land of another (trespass).

- **Notes**: if you need access to workers to fulfill demands of a gvmnt program, then you can have access to a property.
  - Right to exclude
    - One reason for private property is to give people incentive to be prod.
    - Concern over right to exclude is concern for the derivative rights/benefits the right provides
    - Allowing these people on the land does not undermine property owner’s rights – it simply educates others as to theirs under the law.
    - WHERE DO YOU DRAW THE LINE?
  - If access to the farm were allowed in such a way that it destroyed farmer’s land, then the case would be different.

**Leaseholds**

- nonfreehold estates
- four types
  - term of years: estate that lasts a fixed period of time (O to A for 37 years) or you can determine by a formula
  - periodic tenancy: estate that lasts for a fixed duration but can be renewed for consecutive periods (O to A for month-to-month); ends when notice is given.
  - tenancy at will: tenancy of a nonfixed period as long as landlord and tenant desire to keep it; terminates upon the death of one party
  - Tenancy at sufferance: arises when a tenant wrongfully remains in possession after the lease is up
    - Tenant is typically liable to landlord for fair market value of property (not what the rental agreement is for).
    - In this situation, landlord has two options: (1) evict, and (2) agree explicitly or implicitly to a new tenancy
    - New tenancy is either month-to-month, quarter-to-quarter or look at the prior tenancy and renew with that time period and the terms are typically the same as the previous lease.

**Garner v. Gerrish** (NY 1984)
- **Facts**: Executor of will claimed there was a tenancy of will and it was his right to terminate it when Donovan (original conveyor) died.
- **Rule**: Unless it is expressly written into a contract, landlord does not have the right to terminate the lease (evict) but tenant does.

**Crechale & Polles, Inc. v. Smith** (Miss 1974)
- **Rule**: Once a landlord elects to terminate, he cannot later ask for back rent and damages when the tenant does not vacate immediately.
- **Notes**: Instead of what he did, landlord could have elected to evict but noted in his letter that IF tenant does not leave immediately, that he will be considered a holdover tenant for one more year and responsible for all associated rental costs.

**Lease agreements**

- Sublease: tenant transfers leasehold interest to some 3rd party. Promotes alienation.
Tenant transfers something less than his or her entire interest or for some period less than the entire unexpired term; retains right of reentry.

- No privity of estate between landlord and sublessee (T2 is T1’s tenant)
- No privity of K
- Nothing has changed between landlord and T1
- If T2 does not pay rent, landlord will go after T1 and T1 will go after T2.
- It is possible to create privity of K if T2 assumes all obligations of lease.

- Reversion: landlord transfers landlord’s interest in the property.
  - New owner may take subject to the lease: may have provision in lease agreement saying that when landlord sells his interest the lease may terminate.

- Assignments: tenant assigns all of his interest under the lease for the entire unexpired term of the lease (tenancy at will is non-transferable)
  - All covenants in original lease now bind assignee.
  - Assignee and landlord are now in privity of estate (both have interest in the same piece of land)
  - Look at parties’ INTENTION—did they mean it as a sublease or assignment?
  - Assignee and tenant are NOT in PRIVITY OF CONTRACT unless the assignee EXPRESSLY ASSUMES the covenants in the lease.
  - Original tenant and landlord: were in privity of estate and contract. The tenant has now assigned his lease to someone else:
    - No longer privity of estate but still privity of K
    - If assignee, T2, fails to pay rent, landlord can still sue T1 under K … T1 can go after T2. T2 and landlord are now in privity of estate landlord can go after him; if T2 assumes all obligations of lease, he may be in privity of K
    - For T1 not to be responsible at all, there must be an express provision where T2 takes all responsibility and landlord releases T1

- Restraints on transfer: (can landlords restrict assignments/subleases?)
  - Transfer is generally allowed unless there is a provision which prevents it w/o landlord’s consent; We want to promote alienation, but recognize that landlords have interest in who lives in their property; Landlord cannot withhold consent unreasonably; Look at example (p39 of notes)
  - Ex: T1 enters lease agreement with T2. Landlord gets T2 to enter separate K where T2 agrees to all obligations. Now, landlord can go after T2.

**Kendall v. Ernest Pestana, Inc.** (Cal 1985)
- **Rule:** Consent for an assignment of a lease can be withheld ONLY where the lessor has a commercially reasonable objection to the assignment? (implied reasonableness standard) 
  - favors free alienability (promotes transfer of property)
- **Note:** this rule is also generally applicable to residential leases

- Mandatory rules (cannot contract around it) and default rules (if you don’t contract around it, then this will be the rule)
- Consideration of the role of relationships in evaluating these subjective standards
- This is not so much about alienability and efficiency but about bargaining power, relative sophistication of parties, information available, etc.
• How are landlords likely to respond to all of these rights/protections given to tenants at expense of landlord?
  o Increase rents, larger security deposits, larger finders fees \(\rightarrow\) extract value
  o Draft provisions in lease agreements that say “you cannot assign w/o consent and we can deny for any reason we want”
  o Outright prohibition to subleasing

**Berg v. Wiley** (Minn 1978)

**Rule:** Self-help is never available to dispossess a tenant who is in possession and has not abandoned or voluntarily surrendered premises … if P never surrenders, D is not entitled to property and any reentry is considered forcible. D should have used judicial means.

**Notes:** if L has a legal right to reenter, he must do so peacefully (old common law rule)

• Modern trend: L must rely on judicial proceedings as a means to remove tenant
  • Dependent covenants v. independent covenants:
    o Independent: used to be that T’s obligations under lease were independent of landlord’s duties under lease … if tenant breaches, L may sue for damages but he must continue with his obligations
    o Dependent: treat landlord and tenant’s obligations together—if one ind stops performing obligation, the other may stop. L may evict T.

• Prohibition of self-help:
  o Prevent breaches of peace
  o Whether or not a tenant or beneficiary can waive it
    ▪ Tenant may give it up for other benefits, such as reduced rent
    ▪ T and L derive social benefits, which they cannot contract around – these policies exist to protect the whole of society
    ▪ There are practical problems with lease agreements like this
  o Rule makes it more expensive for L to evict T (must use judicial proceedings, which are more expensive)
  o How will landlords respond?
    ▪ Increase rent
    ▪ Require background/credit checks
    ▪ Ask for bigger security deposits, finders fees, etc
    ▪ Not rent to people L thinks are high-risk
  o How might tenants respond?
    ▪ May alter lifestyles so they never leave premises
    ▪ May buy a gun/dog

• Self-help generally applies to RESIDENTIAL leases as well (PP)
  o Sanctity of the home and personhood
  o L and T may have more of unequal bargaining relationship
  o Amplified emotions in residential context, people may be more likely to respond violently

• Reasons to have self-help rule
  o Too much control with landlord
  o Idea of possession, present possession
  o Home, and the residents having some higher status
General argument that for anybody who wants to change the status quo, the burden is on you
What happens if L is wrong?

**Tenant who has abandoned possession**
- Abandon: when a tenant leaves a premises w/o having right to do so.
  - L may accept surrender of premises, terminate the lease and hold tenant responsible for backrent
    - L may be able to sue for anticipatory breach and repudiation, L may have suffered damages
  - L may go out and get a second T and hold new T liable for deficiency in rent
  - L may permit T to vacate premises and still try to collect. (If landlord has a duty to mitigate, this is not a viable option)
  - Sue to recover the premises and for backrent
  - L may wait until end of term, when lease has expired, then try to sue vacating tenant for all of the accrued rent
- Common law rule: a landlord may, but need not, mitigate damages when T vacates
  - Now, courts require L to mitigate by using reasonable care to relet
  - If L relets for less than market value/rental value: T would be liable for amount of rent he was paying and what L could reasonably have expected another T to pay (fair market value)
  - If L relets at above the original rental rate:
    - Some courts say L gets to keep the spread, some say T who abandoned gets to keep the spread
- If landlord fails to mitigate:
  - Some courts say landlord cannot recover at all
  - Some say landlord can recover but only the difference b/t the original rent and what he would have been able to relet premises at
- Who bears burden of proof in “duty to mitigate” cases?
  - Some courts say it is T’s responsibility to prove L did not mitigate
- Why have a duty to mitigate?
  - As long as landlord’s financial interests are covered, why would it matter if T1 or T2 is paying? L should help T1 cover his/her interest in moving out before lease is up. L is no worse off by mitigating.
  - Everyone is better off: T1 gets out, L’s property interest is still protected → efficient breach
  - Insures that property is on the market and not being wasted, it is productive
  - This is L’s vocation – he chose this job and he must bear the risks, including a duty to mitigate.
- L’s arguments against duty to mitigate:
  - L bargains for a particular arrangement, such as receiving rent from T1. T1 should not be free to make this deal and break it—T1 is bound and forced to perform. L has a right to expect performance and enforceability.
  - You should not force upon me the obligation of spending my time and resources finding another tenant.
o T1 must come to me and ask me if it is okay to breach – I have the right to say yes or no. If I say no, I hold greater value to T1’s lease than he feels for it.

- Is L worse off by having duty to mitigate?
  o Each apmt in building may be unique → forcing L to relet helps T1 and leaves L in no worse position. (this apmt will get rented again b/c of its uniqueness)
  o If apmt is not unique, then L has to rent this fungible apmt when he could be renting another one – L is worse off. LOST VOLUME.
  o Could say L only has a duty to mitigate when he has zero other vacancies, since then he would be renting his final apmt
  o To what extent can L steer prospective tenant away from breached apmt in order to maximize number of tenants paying rent?

- Must use reasonable efforts to relet premises
- Should this duty apply to commercial premises also?
  o Commercial tenants tend to be more informed and savvy – no reason to extend duty to mitigate
  o BUT, if the concern is to put productive assets to good use in marketplace, then it seems this rule would apply EVEN MORE to commercial settings

Sommer v. Kridel (NJ 1977)
Rule: A landlord has a duty to mitigate damages where he seeks to recover rents due from a defaulting tenant → reasonableness of effort.

Quiet Enjoyment/Habitability
- Old law: did not provide any requirements that landlord provide certain caliber, tenant took premises “as is”
  o Law changed and now L has responsibility to provide warranty of habitability
  o If not, tenant has a right to withhold rent. Dependant covenants.
- Implied covenant of quiet enjoyment
  o Landlord promises not to substantially interfere with the tenant’s possession, use and enjoyment of the property
  o Related to concept of constructive eviction
- Actual eviction (archaic)
  o Landlord takes some measure to physically keep tenant off premises
  o When there is an actual eviction, tenant is relieved of obligation to pay rent and can terminate the lease
  o OR, tenant can sue landlord for damages and seek injunctive relief requiring L to stop keeping T out of premises
  o Instead, L makes life miserable for T so he wants to move out
- Constructive eviction (Mandatory rule)
  o L acts or intends to act in such a way that gets in the way of tenant’s quiet enjoyment of the property, so as to justify T leaving property
  o Reste Realty Corp. v. Cooper: Any act or omission of the landlord which renders the premises substantially unsuitable for the purposes for which they are leased, or which seriously interferes with the beneficial enjoyment of the premises is a breach of the covenant of quiet enjoyment and constitutes a constructive eviction of T.
Tenant’s right to complain of constructive eviction will be lost if he does not vacate the premises within a reasonable time after the right comes into existence.

- THEORY: lease represents a transfer of right by L to T to use/enjoy property
- What can T do?
  - Stop paying rent and move out
  - Sue for damages, such as cost of relocating and higher rent T may pay
    - Sue for damages = to spread of what place should be worth and what it is actually worth?
  - Stay on the premises and withhold rent. WHY?
    - Risky to leave premises if you rely on breach of the covenant of quiet enjoyment … what happens if there wasn’t a breach?
    - May not be easy to find a new place to live – money, relocate...

- Scope of landlord’s responsibility: Not clear whether L is responsible for what other people do outside the premises or for what other tenants do or for what he knows/does not know about.
  - Re control: Any situation over which L might exert some level of control that results in the problem L has obl to take care of.

- Issues: duty obligation to take care of responsibility couple w/ knowing what the obligation is.

**Implied warranty of habitability** (MANDATORY RULE)

- Graphs from class: we end up hurting people we are trying to help → end up with fewer units at a higher price, although they may be more habitable
- General rule of HABITABILITY: L must ensure the suitability of premises they are leasing
- Dependence b/t L and T obligations: If L breaches warranty, T may withhold rent
- Warranty:
  - Must be met and breach occurs if the place is deemed uninhabitable by the average reasonable person
  - Objective is the safe, healthy, happy person
  - L will deliver/maintain premises that are safe, clean and fit for human habitation throughout the period of the tenancy (covers all latent defects)
  - Generally nonwaivable, explicitly in the terms of lease agreement or implicitly in the agreement
  - Some courts will allow T to waive if done knowingly and to agreement T/L
  - Warranty DOES NOT extend to commercial leases
- Tenant’s remedies if L breaches (or if L sues for unpaid rent):
  - Terminate the lease
  - Get rent reduction/abatement (if L tries to sue for back rent if T does not pay)
  - Tenant can withhold rent until landlord fixes problem
  - T can sue for consequential damages for discomfort, annoyance, damages, rent he has already paid, relocation costs, possible punitive damages (if L’s breach is willful, wanton or fraudulent) or sue to have L repair (specific perf)
  - Repair problem yourself and deduct expenses from rent due

- Damages in breach case (Hilder v. St. Peter)
• Difference b/t the value of the dwelling as warranted and the value of the dwelling as it exists in its defective condition
• Damages should be awarded for T’s discomfort/annoyance arising from breach
• If L is notified of defect and fails to fix it and then T pays for it, T may be able deduct cost of repair from future rent. (can also sue L for breach of K on his promise to fix it)

Why do we have this warranty?
• T may be uniformed and lack bargaining power (need protection from law)
• T generally expects habitable premises
• With existence of housing codes, act of renting = implied warranty…
• Re negative externalities: result when there are buildings, premises, complexes that are dangerous – may lower value of community or pose safety/health dangers

If T withholds rent, arguing that it is not habitable and if L sues – the court may decide that T unjustifiably withheld rent and L may be entitled to EVICT
• Better to use the courts

Do we really need to have the implied warranty since we already have covenant of quiet enjoyment and doctrine of constructive eviction?
• T’s perspective: it’s expensive to move (quiet enjoy/cons evict = expensive)
• We want to preserve and protect possession (SEE RADIN ARTICLE)
• Letting T move does not remedy problem
• It may be bigger than L/T → may be about T and everyone else.

Rent control

Benefits
• Helps people retain their housing by keeping prices low when market pressures might otherwise lead to price increases
• Promotes personhood for ind → home = paramount example of personal prop
• Fosters community by allowing people to stay in their neighborhoods

Criticisms of rent control
• Ultimately hurts the people it is designed to help
• Shrinks supply of available premises and those available are poor quality
• (see graphs on notepad)
• if they can’t charge higher rent, they may charge higher finder’s fees or higher security deposits … maybe they will only rent to affluent
• reduction in quality of housing – landlords must get back money lost by not maintaining premises
  ▪ conflict b/t T’s rights (quiet enjoy/habitability) and what L gets away with
• may be reduced construction of new facilities
• conversion: L may decide to convert to single-family dwellings, etc
  ▪ if enough are converted, price for single family dwellings will go down and middle/upper class will actually benefit
  ▪ should not force landlords to subsidize T. Wealth redistribution.

Radin says re risk of shortage
• We care about current tenants for personhood/community notions
• We do not care about who CANNOT rent apmt or move into community → these are future T who do not have personal claim to existing community.
• All L have is fungible property and T have personal property – we don’t care about fungible, so this redistribution is just
  • Posner’s opinion (re Chicago RC ordinance)
    o Will reduce resources that L devote to improving quality of housing, by making provision of rental housing more costly
    o L will offset costs by charging higher rents
    o L will screen applicants more carefully and marginal T will have trouble
    o Cost of supplying housing will be higher and ∴ will be less
    o Total transfer of wealth (re Chicago ordinance)
    o Tenants may abuse the right to withhold rent

**Right to exclude**
• Federal Fair Housing Act
  o Generally prohibits discrimination on the base of race, creed, color, religion, family status, gender…
  o Family status = families w/ children (often disc. against, esp large black fams)
  o Affects decision to rent or sell, discrim in terms, conditions or privileges in the rental agreement and advertising
  o Exemptions: religious groups, single-family housing, rooms or units that are in small complexes where the owner also lives (then L has more stake in who lives there b/c he has to live with him)
• Who has what burden in order to establish or refute a claim of discrim?
  o P must show that he tried to rent and was denied, that he is a member of protected class
  o T must come forward w/ evidence of discriminatory intent
  o Show a disparate impact – L may have policy in place that appears neutral but has a disparate impact on members of same protected class
  o As plaintiff, you do not require an AFFIRMATIVE showing of intent
  o Gives rise to a rebuttable presumption of discrimination
    ▪ L can rebut the claim by explaining some nondiscrim reason
  o P may claim his “legit reasons” are all pre-text
    ▪ Pre-text: you are using other justification as an excuse for discrim
• **Soules v. US Dpmt of Housing:** Ordinary listener standard → would an ordinary listener have thought this was an “impermissible preference?”
• **Bronk v. Ineichen:** cannot mix state and municipal law on these issues

**Co-ownership/concurrent interest**
• Tenancies in common
  o Have separate but undivided interests in the property
    ▪ Each tenant in common owns an undivided share of the whole
    ▪ Each t.i.c. owns right to possess entire property
    ▪ Ownership interests are fractional – fractional interests undivided
  o Fractional interest in the undivided whole
    ▪ Burden of ownership (tax, etc) shared also
    ▪ Fractional interest can be uneven
  o t.i.c. can agree to privately split up the property
interests are alienable, inheritable, divisable (no rights of survivorship)
  - A and B = t.i.c., A transfers interest to C. C and B are t.i.c.

- Joint tenancy
  - Very similar to t.i.c. but there are rights but there are rights of survivors
  - Each tenant owns the undivided whole but when one tenant dies, nothing passes to the heirs. Rather, the estate passes to the remaining owner.
    - A and B are joint tenants. A dies, B owns everything.
  - Joint tenancy can be severed if one owner transfers her interest or tenants agree to change it or sever a unity (to get a tenancy in common)
  - Four unities required
    - Time: interest of each tenant has to be acquired at same time
    - Title: both tenants had to acquire the title by the same conveyance
    - Same undivided shares: same interest as all other interests (50/50)
    - Each tenant must have a right to possess the whole of the property
  - Not inheritable: when you die your interest expires and you have nothing to pass

- Tenancy by the entirety
  - A form of joint tenancy that is limited and only available to married
  - Requires a fifth unity: MARRIAGE (ends on divorce, for loss of unity)
  - Surviving tenant has right of survivorship
  - Different from joint tenancy:
    - Neither spouse can sever survivorship rights by a UNILATERAL transfer of interest – both have to agree to convey property
    - No right of partition on the property
  - Not inheritable: when you die your interest expires and you have nothing to pass

- Role of transaction costs in law
  - Ind joint tenants can sever relationships, either by a straw or by transferring it to yourself. (ability to transact around legal rules)

- Examples: O conveys to A, B, C as joint tenants. (each has 1/3)
  - A sells interest to D and B dies, leaving H as heir. By conveying, tenancy b/t A and B/C is severed. D has a 1/3 interest as a tenant in common with B and C, who share the other 2/3 by themselves.
  - B just died and left H as his heir. H gets nothing. C gets B’s 1/3 for 2/3.
  - Even if B had a will saying that he wanted to leave it to H, that would not have severed the joint tenancy relationship.

- What happens with a lease?
  - A and B are joint tenants. A conveys a 6 year lease to C and after 3 years A dies and leaves all property to D.
    - Lease does not sever joint tenancy and lease expires at death of A. A lease held by C expires when A dies. B, surviving joint tenant, would declare the lease as no longer valid and kick C off. B would beat D to whom A divised property.
  - Other courts say that a lease severs the joint tenancy thus there is no right of survivorship and the property goes to D.
  - OR, lease may not sever the joint tenancy relationship so B continues to beat D but the lease also continues to stay in effect so C stays for 3 years.

- Sharing benefits and burdens
o rents and profits; taxes, mortgage payments and other carrying charges → deserve rights of contribution from co-tenants
o repairs and improvements: co-T has no affirmative right to contribution from others in absence of an agreement

- Partition
  o Sharing benefits and burdens among co-tenants
  o Through partition, get rid of joint ownership by one of two ways
    - (1) divide property into separate pieces owned by separate people
    - (2) sell the property to someone else
  o Who can bring an act for partition?
    - Tenants in common or joint tenants
  o Two kind of partition
    o Partition in kind: physical → one tenant seeks a court order which will result in physical division of prop among tenants (preferred)
    o Partition by sale: court order forcing sale of property to some 3rd party, and proceeds will be split b/t co-tenants, according to fractional interests

- Delfino v. Vealencis: P wants partition by sale and D wants partition in kind; courts hold that physical division of the property will serve best interests of all parties
  o Partition by sale: ordered only when (1) physical attributes make partition by sale inequitable or impracticable or (2) best interests of parties would be better promoted by partition by sale.
  o Disparity of wealth b/t parties → P may be able to afford to buy D out.
    - Value D b/c of property as personhood (Radin) (endowment effect)
    - Equity/fairness: but it is a better use of the resource?

- Mackereth v. Spiller: court holds that if tenant-in-common did not deny any right to enter to the co-tenant then he is not liable as an ouster (one who tells another that he cannot come onto the property)

III. Transfer of property: Deeds, mortgages, title insurances

Statute of Frauds
- To satisfy SotF, memo of sale must, at a minimum, be signed by the party to be bound, describe the real estate, and state the price.
- Exceptions: part performance → allows specific performance of oral agreements when particular acts have been performed by one of the parties to the agreement
  o Estoppel → if unconscionable injury or unjust enrichment would result from reliance on the statute

Marketable titles
- A title that is free from encumbrances and that is not subject to such reasonable doubt as would create a just apprehension of its validity in the mind of a reasonable, prudent and intelligent person who is guided by competent legal advice and who would be willing to take the title and pay fair value for it.
  o Title does not have restrictions a reasonable person would find unacceptable
  o Requires or forces upon buyer some degree of risk upon acquisition
  o Requires standard of REASONABLENESS
- What might make title doubtful?
  o Relevant documents (such as deeds) may not have been recorded properly
Relevant documents may lack signatures
Relevant documents appear valid but actually conflict with each other
Others may have future interest in property
  - Problematic leases, wills/trusts, easements, covenants, adverse poss.

- Implied condition for a K → seller held to representation that title is marketable
- Breach of representation: buyer can rescind K and get earnest money back
  - Bargain damages: difference b/t K price and market value on date of breach

**Lohmeyer v. Bower**: property must be merchantable and marketable, free from reasonable doubt and not exposing either party to litigation … it is not, then it is not free from encumbrances. Restrictive covenant made title unmarketable.
  - zoning restriction was not enough to make the title unmarketable
  - differences b/t violations of marketability b/t covenants and zoning:
    - don’t want gvt restricting sale of land
    - it is expected that buyer will look through all records re property that should reflect all covenants; that is different then expecting them to look through all related gvt codes, statutes, etc.

**Conklin v. Davi**: If there is not a reasonable belief that a claim from the true owner would be forthcoming and that the true owner’s claim would be successful, then adverse possession does not make the title unmarketable.
  - Why not require a perfect title?
    - Hurts alienability – too likely that there is something imperfect
    - Makes it too easy for buyers to back out

**Land transaction: how to assure title is marketable**
- Direct examination: attorney gives buyer a written statement, “certificate of title” → he has made examination of title and the fee simple is vested in the vendfor free and clear of any encumbrances
- Abstract: corporation goes to courthouse and check in the same fashion; provides a summary of all records concerning title (most prevalent in US)
- Local title insurance: when a title policy is ordered, insurance company makes its own examination

**Duty to disclose**
- Caveat emptor (buyer beware): no duty to disclose; obligation is on buyer to inspect, inquire, find out defects (including the non-obvious)
- Seller has a duty to disclose when defect is material and seller is aware of the defect (including when seller should have been aware but wasn’t) and when defects are not known to or readily knowable by the buyer)
- Stigma statutes: do you have to tell buyer everything (ex: there was a murder here…)
  - Objective vs. subjective elements: some things that offend some people and some things that offend all people (i.e. leaky roof)
- **Stambovsky v. Ackley**: where a condition created by the seller materially impairs the value of the K and it is within the knowledge of the seller or unlikely to be discovered by the prudent purchaser exercising due care with respect to the subject transaction, nondisclosure represents a basis for rescission as a matter of equity (poltergeist)

**Mortgages/foreclosures**
- Mortgages: security interest in underlying property (treated same as deeds of trust)
- Bank foreclosures: why is the bank the only one to show up?
Financing: bank does not have to come up with money because the house already belongs to it. It just has to become whole.

- Bank knows most about the property so third persons might not want to outbid the bank, thinking there is something the bank knows that they don’t know.

**Why is this the bank’s responsibility:** responsibility to mitigate damages (to the borrower to recover some equity)
- Economically efficient to help buyer recover equity
- Ex-ante effects: if a legal rule increases the cost of doing business to the bank, bank is likely to increase interest rates, credit costs (pass the cost).

**How to make it not the bank’s responsibility:** force the borrower to drum up interest in his property during a foreclosure sale
- Grant borrower more time, but charge him for it.

**Murphy v. Financial Development Corp.:**
- Even if a mortgagee complies with statutory law, he has violated his additional duties of good faith and due diligence if he has, or should have had, knowledge of his ability to get a higher price at an adjourned sale.
  - Lender must use ordinary methods to sell the place
- When a mortgagee fails to exercise due diligence, the proper assessment of damages is the difference between a fair price for the property and the price obtained at the foreclosure sale: if they used bad faith, court would hold them to fair market value.

**Deed**
- 3 types of title in U.S.
  - General warranty deed: warrants against all defects in title, whether they arose before or after the grantor took possession
  - Special warranty deed: warrants against grantor’s acts only and not the acts of others
  - Quitclaim: caveat emptor.

**Warranties of Title of General Warranty Deed**
- Covenant of seisen: grantor warrants that he owns the estate
- Covenant of right convey: grants warrants that he has the right to convey the estate
- Covenant against encumbrances: grantor warrants that there are no encumbrances on the property
- Covenant of general warranty: grantor warrants that he will defend against any lawful (read as successful) claims and compensate the grantee for loss sustained via a superior claim of title
- Covenant of quiet enjoyment: same as (iv), sometimes not included as repetitive
- Covenant of further assurances: grantor warrants that he will execute any further documents necessary to complete transfer

**Delivery of Deed**
- Immediate Delivery: deed exchanged upon receipt of consideration or
- Third Party Delivery: deed given to an escrow agent. The agent is an agent of both Seller and Buyer. The Seller cannot recall the deed. If the K is fulfilled, the deed goes to Buyer. If a problem arises, the deed goes back to Seller.

**Delivery without Handing Over** if the grantor intends to be bound by an act, implicitly or expressly, then delivery has occurred. The grantor’s intent drives the analysis here.

**Mortgage**
• A mortgage is a security interest that allows the mortgagee (lender) to sell the land if the debt is defaulted by the mortgagor (borrower). Second mortgages are subject to the rights of the first mortgage.
• A mortgagee is bound by a duty to protect the equity interests of the defaulting party. This is essentially a fiduciary duty. A mortgagee must obtain a fair price for the property being foreclosed upon. A fair price is one garnered by the mortgagee acting in the same manner a reasonable seller would.
• Damages The defaulting party can recover the difference between the price garnered and the fair price if the mortgagee does not act in due diligence but the difference between price garnered and fair market value if mortgagee acted in bad faith. (Unclear as to the difference between these measures except the former typically yields less damages.)
• Other methods require buyers to advertise in order to get a fair price and let the bank charge if buyer wants to delay sales

The Recording System
• All deeds, conveyances, etc, must be on file in the county courthouse. The goal is to provide clarity of ownership.
• Types of Recording Acts
  o Race Statute: whoever records the title first gets the rights
  o Notice Statute: a subsequent purchaser of the same interest can not succeed if they were on notice of the previous purchaser, even if previous purchaser did not record
  o Race-Notice Statute: a subsequent purchaser can gain title if
    (a) were not on notice of previous purchaser and
    (b) they subsequent purchaser records first.

Adverse possession
• You may transfer your property even though you do not want to; also, do it for free
• Occupy someone else’s land for a sufficient period of time and then that land becomes yours (you get title); original owner no longer has a claim
• Elements of adverse possession:
  o Actual entry giving exclusive possession
    Has the property been improved at all? (not a requirement)
  o Exclusivity: possession is not shared with owner or with the public as a whole
    If it’s shared w/ owner, you may be there with permission (then it is not adverse and owner has no cause of action for trespass)
    If you’re sharing with the public, then it is not clear who owner would go after
    Why do we have this requirement?
      • Triggers relevant cause of action (wrongful entry ejectment)
      • Need to be able to give landowner notice
      • Insures that adverse possessor deserve to get title (possessed land and did something productive with it)
  o Open and notorious: must possess the land so that owner knows you are there
    Must be sufficiently open/notorious to be obvious to a reasonable owner in the regular course of his duties
    May conflict with possession and continuity ➔ may be possessing property and doing it continuously but not openly
Must be adverse (hostile): insure that adverse possessor is not in possession subordinate to the owner, with the owner’s permission but rather, is claiming property for himself.

Continuous: does not matter when you go there, so long as it is continuous
- Gives true owner sufficient time to discover property is adversely possessed
- Ensures that adverse possessor has diligently stuck to his/her claim
- Puts the owner on NOTICE
- Awarding title to irregular/inconsistent possession would be unfair
- **Endowment affect**: the longer and more continuous my possession, the more I start to value property as my own

- **State of mind of adverse possessor**
  - It is irrelevant: we don’t care what adverse possessors though. He is on someone else’s property and that is enough to trigger ejectment.
  - Adverse possessor thought he owner the property (honest mistake)
  - Adverse possessor thought/knew it was someone else’s but wanted it anyway
  - (courts disagree on whether you need a particular state of mind)
  - wrong-doer often wins and we do not want to reward wrong-doers

- **what can true owner do to avoid this?**
  - Kick trespasser off
    - Actual possession: I kicked you off so you no longer possess it
    - Continuity: I kicked you off, you cannot keep coming back
  - Give permission: no longer any hostility
  - Sue them: action for ejectment interrupts the statutory period
  - Move on to the property: take possession yourself

- **Reasons to have adverse possession:**
  - Efficiency: do not want to have unused property (rewards individual using property most productively)
  - Penalize owners who sit on their rights ➔ clarify title, eliminate stale claims
  - owner may have **abandoned** his claim
  - personal/fungible: (Radin) over time, adverse possessor’s claim will become more personal and less fungible
  - endowment effect … value gained
  - quiet title ➔ promotes alienation
  - adverse possessor develops some reasonable expectations of what he can do with the property (certainty/security); true owner facilitates this development by not kicking anyone off
  - administrative convenience: as claims become older, it is difficult to determine to whom the property belongs

- applies to real and personal property
- mixture of statutory and common/case law
- How does a.p. relate to first-in-time?
  - Makes property more productive (only nominally)
  - Provides notice (Ghen v Rich) ➔ if you’re the first to use it, put everyone on notice and take it under your control
  - If you’re the true owner: I was here first and the property is mine
• **Boundary disputes:** adverse possession must be clear and unequivocal; owner must have **actual knowledge** (Manillo v. Gorski)

• **Tacking:** there must be privity of estate to permit tacking to establish adverse possession as a matter of law (tacking: tack on the use of property by previous owners) (Howard v. Kunto, see below)
  
  - Where several successive purchasers received record title to tract A under the mistaken belief that they were acquiring tract B, immediately contiguous, and where possession of tract B is transferred and occupied in a continuous manner for more than 10 years (statute in this case), tacking is permitted
  
  - **Ex:** A enters O’s adversely. In 1994, B tells A to leave and A, feeling threatened, leaves. Under 10 year statute of limitations, who owns the land in 1997? O, b/c it was an involuntary transfer against A and there is no privity of transfer – statute of limitations for B starts in 1994.
  
  - Adverse possession runs against a successive owner – if O transfers his possession to D, A can still run the same statute of limitations against D.

• **Encroachments, improvements and disabilities**
  
  - Award innocent improvers by granting them compensation equal to the market value of the improvements or permit removal of improvements
  
  - If encroachment is “innocent,” courts look at relative hardships to the parties of granting/denying injunctive relief
  
  - If encroachment is willful/intentional, courts issue an injunction requiring removal of encroachment regardless of balance of convenience or relative hardships
  
  - Disabilities: immaterial unless it existed at time when cause of action accrued
    - Statute stops running if there a disability (crazy, infant, etc)

• **Adverse possession against gvt**
  
  - does not run against the gvt \(\rightarrow\) gvt can adversely possess your property but you cannot adversely possess its

  - why is it this way? (PP)
    - Monitoring problems (expensive for gvt to watch all of its land)
    - Gvt is less competent at controlling its agents (i.e. a park ranger) and land is difficult to monitor
    - Treatment of gvt land usually benefits the public – we all benefit so why let anyone take it under private control?
    - Gvt land best used in the form of a commons
    - May threaten property in the public domain (we want it there for many reasons)
    - May lead to excessively fragmented ownership

  - Why might we allow it (PP)
    - Encourages private ownership and productive use of land
    - Gvt should not get special treatment (different treatment)
    - Even if we cannot go out and take adverse possession, we should be able to access gvt-owned office space, vacant lots, etc.

### IV. Restrictions on use

**Judicial restrictions: Nuisance**
• Interference with use and enjoyment of land in order to give rise to liability must be substantial; must be intentional and unreasonable or the intentional result of negligence or reckless or abnormally reckless behavior.

• **Private nuisance**: unreasonable interference with use and enjoyment → thought to cause harm to a particular property/owners and any of the affected can bring suit against person causing nuisance

• **Public nuisance**: any unreasonable interference that causes harm to the public at whole. Gvmt can bring suit or one individual can bring a suit based on his own needs (in addition to gvmt); interference has to be **substantial**
  - Ex: air pollution, loud animals, public gaming
  - Public nuisances can give rise to private nuisances
  - Unreasonable conduct:
    - Long-lasting; Ongoing; Illegal; or Puts public health, peace, comfort or convenience at risk.

• **Reasonableness inquiry (first approach)**: if it is reasonable, there is no nuisance
  - **Balancing the equities**
  - Distinction b/t intentional and unintentional
  - May reflect an ultimate policy by the courts
  - Does the act generate more harm than good?
  - Factors to consider:
    - Extent and character of the activity (playing stereo loudly – what time is it?)
    - Extent and character of the harm (oil refinery causes you to be unable to grow orchids, we don’t care. If it makes you ill, we do care.)
      - Courts are not sympathetic to aesthetic complaints
    - What is the social value of P’s use of his land? (we don’t care if D interferes with P’s use of his house in the Hamptons but we do care if D interferes with P’s home for abused children.)
    - Suitability of the use given the locality (pig farm in rural area vs. Clayton)
    - Burden on P of avoiding harm (can P just shut his window, example)
    - What is the burden to D of avoiding the harm?
      - What if there is a waste of resources?
    - What is the social value of D’s conduct?
    - Who was there first?

• Competing views:
  - We should not do all of this social balancing – one person interfered with ability of another party to enjoy his land. We do not care what D is doing or how good it is … D brought harm to P and he must pay.
  - Restatement: Interference constitutes a nuisance if the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation infeasible.
    - You only have to pay, if you would go out of business as a result of paying

• **Remedies** (balancing of the equities)
  - Damages or injunction (enjoin the activity)?
  - Practical effect of permanent damages and injunctive relief?
    - Allows D to buy the right to pollute at the cost of permanent damages. Makes for a forced sale by P of right to clean air.
o Dissent (criticisms)
  ▪ Effectively allows D to commit a wrong so long as he pays
  ▪ Gvmt can always regulate
  ▪ If we are so concerned about nuisances, why are we letting courts deal with it?
    • Legislature should deal with larger issues
    • We adjudicate the issues directly before our court
o Granting of injunction means right to clean air was allocated to P
  ▪ Court sets price (permanent damages) at which D can buy itself out of an
    injunction ➔ buy right to nuisance (pollute) or buy neighbor’s rights (to clean
    air). P cannot say no ➔ forced transfer of rights = your right to clean air is
    protected by a liability rule and not a property rule.
  ▪ Period damages: ex: every ten years, P goes to court and receives damages for
    previous ten year period.

• Coming to the nuisance
  o D can argue as a defense in nuisance claim that P came to it (D was there first)
    ▪ P assumed the risk of the nuisance by not being there first
    ▪ P, being there second, is actually interfering with D’s use of land
    ▪ P has failed to mitigate damages by coming to the nuisance
    ▪ P, if second, arguably did not suffer any damages b/c the purchase price he
      paid for the property should reflect the nuisance; further compensation would
      be a windfall
    ▪ First-in-time: D was there first so he should be able to use his property w/o
      having to pay damages
  o Coming to the nuisance is not conclusive – it is just a defense
  o What did P come to? What about expansions…?

Property vs. Liability rules
• Property rules: Permits violation of the right (right to pollute, to be free from pollution)
  only if you (person who wants to pollute) first get the permission from the holder of the right
  o Sale of my rights are voluntary, not forced
  o Ex: injunction ➔ community has clean air rights and D can only pollute w/ permission
• Liability rules: permits violation or taking of this right if violator pays some judicially
  determined sum to the property holder
• Inalienable entitlements:
  o we give you a right but you cannot sell it
    ▪ ex: your body, right to vote, right to labor, nonwaivable legal protections
  o moralism: I feel bad when I know someone else had sold their heart (neg externality)
  o paternalism: you don’t know what’s in your own best interests sell your kidney
  o self-paternalism: when things get tough, I know I might sell my kidney so please
    protect me from myself and make it illegal to sell it.
  o Distribution choices: where is the wealth distributed when we make these sale choices?
• Why does this matter?
  o Re nuisance: property rights can be allocated differently – who has what rights?
  o Four ways to deal with nuisance cases:
    ▪ Abate the activity by granting right-holders (neighbors) injunction
• Tantamount to granting neighbors right to clean air protected by a property rule (factory owner cannot take away right)
  ▪ Let activity continue if factory owner pays damages
  ▪ Tantamount to granting neighbors right protected by liability rule
  ▪ Let activity continue by denying neighbors all relief; community loses and factory owner can continue with activity → grants owner right to pollute protected by a property rule
  ▪ Abate activity giving rise to nuisance if neighbors pay factory damages (cost of ending activity)
    ▪ Giving owner right to pollute protected by a liability rule

• What factors influence which rule we use?
  o Transaction costs: can there be post-injunction bargaining
  o Distribution costs: where will the money flow and how do we decide?
  o Who is the least-cost avoider? Who can avoid it most cheaply?
  o Can we calculate damages?

• Examples:
  o Eminent domains: gov't can take your property so long as they give you just compensation (liability rule)
  o Intellectual property: gov't can infringe on IP rights and I will have to pay you consideration (royalties)
  o Accidents: I don’t have to negotiate with you before I injure you. Liability rule: I pay you after I hurt you.

• When might we favor liability rule?
  o When there are high transactions costs that might impede post-injunction bargaining
  o There are larger social interests at stake (don’t want factory to shut down)
  o Generally, distributional concerns (care about local economy)

• When might we favor a property rule? (problems with liability rule)
  o Under liability, people might take others’ stuff (reduce violence)
  o We might expend too many resources protecting our stuff
  o Sometimes it’s hard to calculate damages under liability
  o My objective is to be productive and if I think it will get taken, I may not invest as much in acquiring it
  o People expect property rule protection

• Problems with damages calculations
  o Idiosyncratic value → people value things differently
    ▪ Creates holdout problems (don’t know how to deal with it)

Easements
• Private land use controls/arrangements (law of servitude)
• Right to use land at the same time, as divided b/t two people (person who owns the land and person who does not have the right to possess it generally but have the right to use it)
  o An interest in land; typically some land owner grantes another person the right to cross his property to get someplace else/do something else
  o Right of way (lay terms)
• What kind of easements are there?
  o Easements of pertinent
- Easements that run with the land as opposed to the individual
- Burden my land to benefit somebody else in their ownership of their land
- Dominant tenement (land benefited by easement) and servient tenement (land which is burdened, on which the easement exists)
- Attach to the dominant tenant and pass on to later owners of dominant tenement. After prior dominant tenement owner passes it, he loses it → the easement is attached to the land and passes in ownership, it does not stay with the owner when he transfers his ownership interests. Interest in land.
  - Easements in gross
    - Do not benefit the owner of the easement in the use of the land but benefit the owner w/o regard to ownership of the land. Benefit a user of the land.
    - Attach to a person who is using the land and not the owner.
    - Person with the owner can keep the easement regardless of wherever she goes.
    - Ex: power lines, sewer lines, etc are typically easements in gross – has nothing to do with ownership of the land. These companies simply have the right to use the land for these purposes.
    - Not attached to the land, simple a personal benefit.

- How do you create an easement?
  - Express agreement: (in writing b/c easements are subject to statute of frauds)
    - Make sure you do not create a fee simple (everyone should recognize what you are and are not doing)
  - Estoppel: (works against the person trying to get out of a promise)
  - Prescription: similar to adverse possession
    - Requires adverse use of easement
  - Implication:
    → by prior existing use
    - requirements:
      - dominant tracts originated from a common grantor (used to be a single piece of land)
      - at the time the tracts were separated (part of the parcel sold), one part was used to benefit the other part (quasi-easement)
      - use must have been apparent, continuous and reasonably necessary
      - if the buyers of the tracts being necessarily had been aware of it, they would have said the quasi-easement should be a real easement
      - protect the reasonable intent/expectations of the parties
      - apparent: something the buyer of the servient tract knew about or reasonably should have known about at the time of the sale
        - apparent is not necessarily the same as visible
      - continuous: whatever use was originally intended is still going on
        - use was intended to continue after the sale
      - reasonably necessary: something less than strictly necessary
    → by necessity
    - requirements:
      - former unity of ownership by the dominant and servient tracts
      - necessity → real necessity, not just convenient or useful
      - necessity existed at the time of severance
o no need for prior existing use

- why do we have easement by necessity?
  - Intention: parties did not intend to sell a land-locked piece of property
  - Public interest argument: public has a strong interest in having accessible land so that we can put it to productive use; we don’t want people stuck on land
  - Communal reason: we need to force people to work together to be neighborly
- You do not get an easement just b/c it is necessary → must satisfy all requirements
  - It’s my property: how do I know what everybody else needs? Encumbrances are supposed to be recorded.
  - Questions of necessity are important in determining inquest.
- Why do we not allow easement by necessity when there was not unity of ownership?
  - Costly searches
  - Promote public peace (discourage self-help)
  - Surprise is not like in property law
  - Intent of the parties is not there

- Licenses
  o Permission given by some landowner to a licensee to do some act that otherwise would be considered trespass
    - Ex: let electrician come make repairs, invite a friend over for dinner
  o License is revocable at any time (ask guest to leave) and easement is not revocable → it is an interest in land
  o Exceptions to revocability of license
    - License coupled with an interest cannot be revoked
    - License becomes irrevocable b/c of estoppel (easement by estoppel)

- Holbrook v. Taylor: if an individual has been given permission to use land for purposes of erecting constructions/improvements, the licensor cannot revoke the license given after an individual has already erected the improvements at expense

- What can you do to prevent a license from obtaining an easement by estoppel upon making substantial improvements?
  o Get neighbor to sign an agreement up front waiving claim to an easement by estoppel
  o Get neighbor to build someplace else
  o Revoke license before they make substantial expenditures
  o Try to sell them an easement
  o Tell them they can build the house but retain your right to revoke the license at any point (would a court enforce this?)

- Damages from licensee to licensor
  o Do not typically receive damages when a license is converted
  o Why? Bilateral monopoly (two parties will not value things at their fair market value); No judicially-determined damages → why should the licensor get paid for sitting on his property

- Scope of easements
  o Easement owners can use their easements for a reasonable use → depending on circumstances, the use may change over time.
If changing the use would create some burden on the servient owner or change the way the servient owner uses his land (disrupts his enjoyment of his land), it is not within the scope.

How do we determine if we are using easement within its scope?
- Kind of use: is this the kind of use that was intended?
- Does this use increase intensity of the use or burden on the servient land?
  - Try to accommodate both party’s interests
  - What did the parties intend? What did they foresee as use?

- **Brown v. Voss**: use of easement for a non-dominant parcel not permitted → possible slippery slope, public policy issue

- Beneficiary of an easement is entitled to make any use of the servient estate that is reasonably necessary for the convenient enjoyment of the servitude for its intended purpose.
  - May change to accommodate normal development of the dominant estate

- Location of easement: once fixed by the parties, cannot be changed by the servient owner w/o permission of the dominant owner (Restatement Third of Property)
  - Servient owner cannot unilaterally change the location w/o telling, getting permission from the holder
  - Servient owner can change at his own expense if he does not undermine the value or interest of the easement or expectations of dominant estate

- **Termination**
  - Easement lasts forever until it is terminated
  - Can be terminated five ways:
    - An agreement in writing
    - By their own terms → deed conveying easement says it only lasts for some period of time or conditioned on some event
    - Merger → owner of the dominant estate also becomes owner of the servient estate and when the holder of the easement owns both pieces of property, the easement ends. (no easement on one’s own property)
    - Abandonment → non-use is not abandonment; owner actually has to abandon it and say he does not want it anymore.
    - Terminate by adverse possession or prescription

- Negative easements (cannot do these things)
  - Blocking windows
  - Interfering with air flow
  - Interfering with the flow of an artificial stream of water to the area
  - Remove support for a structure
  - (limited cases) blocking a view
  - blocking solar panels
  - conservation easement (you cannot develop if I have a conservation easement)

- **Covenants**
  - another type of land use control, like easements
  - Used to bind or confer the benefit of this agreement onto some later property owner
  - real and equitable servitudes: difference is remedies → real covenants are enforced at law (damages) and equitable servitudes are enforced in equity (injunction)

- **Real covenants**
o Contract-based: written agreement b/t the parties because statute of frauds
o Cannot arise by estoppel, prescription or implication like an easement
o Respects the use of the land and runs with the land at law (damages)

o Two types of promises:
- Affirmative: I promise to do something with my land
- Negative: I promise not to do something with my land

o Requirements for a real covenant:
- Intent: original contracting parties must intend for their successors to be bound by the covenant \(\rightarrow\) look at original K to determine intent
- Touch and concern: covenant must actually touch and concern the property
  - Typically not personal promises (personal covenants)
  - (ex: I promise not to build anything but single family residences versus I promise to sing you a Christmas carol every December)
- privity: must be privity of estate for there to be a real covenant that binds future owners

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<th>← privity b/t original parties (\rightarrow) “horizontal privity”</th>
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<td>Promisee; benefit to property</td>
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<th>If there is horizontal privity and vertical privity, then there is privity b/t D and C.</th>
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- **horizontal privity:** privity b/t original parties (A and B)
  - A and B must have mutual interest in the same land
  - grantor/grantee; landlord/tenant; owner/easement holder; concurring owners
  - no horizontal privity b/t neighbors
- **vertical privity:** when there are successors in interest, privity of estate b/t one of the covenanting parties and some successor in interest; successor must take the original party’s entire land interest
- **for the burden to run:** need horizontal privity b/t original parties and vertical privity between original party and his successor
- **for the benefit to run:** only need vertical privity

- **restatement (distinctions b/t aff and neg covenants):** all neg covenants run but aff covenants only run if you also have vertical privity

- **Equitable servitude**
  - Like a real covenant – interest in land is binding on subsequent land owners
  - Implied in equity (injunction) and not enforced at law \(\rightarrow\) some courts soften this distinction
  - Arise out of a promise and you can get them by prescription
  - Requirements
    - Intent to bind successors
    - Touch and concern
    - Instead of privity, there must be notice (actual or constructive)
Difference b/t actual and constructive:
- Actual: I actually told you what you can/cannot do
- Constructive: you can tell from looking around what the rules are

**Tulk v. Moxhay:** was bound by covenant b/c he had actual notice

**Covenants by a common scheme**
- Ex: landowner has 16 lots and sells 9 of them restricting use for single family homes
- **Doctrine of implied reciprocal servitudes**
  - Where a common grantor develops land for sale in lots and includes a common scheme or plan of restrictions on each of the parcels for the benefit of all the parcels. Grantees acquire by implication a right to enforce the same restrictions on the lots retained by the grantor or subsequently sold w/o restrictions to a purchaser w/o notice of the restrictions.
  - Must have intent: landowner must have intended to create this common scheme and for the restrictions on the early parcels to carry to the later parcels
  - Touch and concern:
    - Notice: buyer who will be subject to restrictions must have notice
      - May be constructive → Sanborn v. Maclean (look around the neighborhood)
    - Evidence courts will look at to determine a common scheme
      - Is there a plan/detailed drawing that shows the restrictions?
      - Advertising real-estate brochures
      - Oral representations
      - What restrictions are imposed in at least some of the deeds
  - Why do we have this doctrine?
    - Protects owners in the area – may have bought property in reliance
    - Property values
    - It’s what the parties intended
    - It’s what the parties would negotiate for anyway
    - For the person who wants to build, one of the requirements is notice and if he has any questions he can ask (inquiry notice) and if he doesn’t like it, he doesn’t have to buy.

**Reciprocal negative easement:** if the owner sells lots with the restrictions benefit to the land retained, the servitude becomes mutual and, during period of restraint, the owner of the lots retained can do nothing forbidden to the owner of the lots sold.
- Runs with the land
- Never retroactive
- Starts with a common owner

**Neponsit case:**
- **Touch and concern:** defines it if the covenant “substantially affects” the land
  - Broadens concept of “t and c” by including legal relations and value
  -impose a burden on land that leads to an increase in value for a related land?
  - If the promissor’s interest is rendered less valuable, then the burden touches the promissor’s land and if the promissee’s land is conferred with a value increase, then it is benefited.
  - Affect the use and enjoyment of the land? → TAP’s rule
  - Covenants to pay money “touch and concern” b/c money goes toward common property (maintenance, etc.)
Re privity of estate: a community organization serves as a proxy of an agent that has privity of estate, therefore organization has privity of estate.

Final notes:
- Covenants re use of land are generally always found to touch and concern (esp neg)
- Courts are generally hesitant to enforce aff covenants

Shelley v. Kraemer
- Restrictive agreements between private individuals who voluntarily adhere are not violative of 14th Amend. rights. However, if the state grants judicial enforcement, then petitioners have been denied equal protection under the law.

Termination of covenants
- Common ownership
- Release (the parties agree that the covenant will no longer apply)
- By its own terms, restriction on duration (covenant lasts till xyz date)
- Abandonment: widespread noncompliance will render a covenant unenforceable
- Statute of limitations: if you don’t bring a suit in a timely fashion, you may lose ability to enforce covenant; only terminates a covenant b/t two specific parties subject to it.
- Estoppel: P seeking to enforce covenant has himself been violating it; court may not allow that enforcement; or if P has let lots of other people violate the covenant
- Changed circumstances: when the covenant does not accomplish the purpose for which it was originally intended or servient estate is not longer suitable for such use
- P885 restatement

Western Land v. Truskolaski: covenants remain enforceable as long as there is still a substantial benefit to those affected, original purposes have not been thwarted.

Rezoning: does not allow owner to use her land in a way that is restricted by a covenant if the covenant is otherwise valid. (negative covenant is not trumped, but you cannot have an aff covenant to do something that impedes the zoning rule)

Liability rules and property rules
- Enjoin breaches of the covenant: protect the property rights of landowners
- Refuse to enforce and grant damages to landowner (give her right to enforce covenant but only protect it with a liability rule, if anyone wants to develop they pay damages
- Deny all relief against breach of covenant -> developer would have right to breach covenant and it would be enforced by a property rule.
- You have a right to build (as developer) but you have to stop if the neighbors pay you your damages for stopping (protect right to breach under a liability rule)
  - Seldom used in a court of law

Zoning
- Concerns relationships b/t individuals and gvmt rather than private agreements
- What is zoning? Gvmt tells citizens what they can or cannot do.
  - History: Village of Euclid v. Realty: court held zoning is a constitutional exercise of state’s police power to maintain public safety, health, welfare
  - Houston: no zoning, everything is mixed use; theory is that private covenants will regulate use; problems with private controls:
    - Tend to only think of themselves; don’t take ex-ante effects into account
    - Private covenants are not broad-based
- Arguments against zoning:
- A taking of property w/o offering just compensation
- May raise constitutional problems
- Problems with private
- **Specifics of zoning:**
  - Common land use regulation
  - Locally-controlled: no federal statutes, regulatory boards that regulate it
  - Zoning boards divvy up area into residential, commercial, industrial (light and heavy)
  - Cumulative: in a given zone, a lighter use than that which it is zoned for is allowable (ex: residential in a commercial/industrial, commercial in an industrial)
  - Zoning also regulates buildings and structures
    - Space, size, density, etc
- **Local government and administrative agencies:** created by and derive all power from state legislation
- **How zoning ordinances are adopted:**
  - Exercise of state’s police powers to protect its people
    - State can delegate this authority
  - (1) some enabling act
    - authorize cities to zone
    - authorize cities to create local administrative agencies to create zoning
    - Standard State Zoning Enabling Act – control land use by district
  - (2) city passes some zoning ordinance \(\rightarrow\) says what you can use property for, creates planning commission to administer ordinance (approves, disapproves); creates a “comprehensive plan” \(\rightarrow\) collection of maps, descriptions of what is permitted
  - (3) proposer has ability to appeal ordinance if it displeases him \(\rightarrow\) board of appeals in city, go to court, get administrative remedies
- **exceptions and variances:** go to the Board of Adjustments to get past ordinance
- **Why can’t nuisance deal w/ land use consideration?**
  - Administrative/judicial efficiency: put undue strain on enforcement mechanisms
    - Some people won’t bring lawsuits, no one there to enforce
  - Easier to order your affairs if you have certainty \(\rightarrow\) won’t commit wrong to begin with if you know the restrictions are in place
    - Reduces risks of making investments and developing
  - General welfare and safety \(\rightarrow\) don’t want houses in middle of industry
  - Zoning prevents activity from beginning and nuisance is after-the-fact
  - Zoning does not rely on court’s efforts to balance equities
  - Zoning does not rely on private individuals to bring valid nuisance claim
  - Not everything we might want to prevent is a nuisance
  - There are things we may want to permit (even if considered a nuisance)
- **Nonconforming use**
  - Lawful, preexisting use used prior to adoption of zoning ordinance that does not comply with the subsequently adopted zoning requirements
  - Amortization: try to faze them out over time so that you can no longer engage in use
    - Potential TAKINGS problem if you say you can no longer use property
    - We give you a reasonable time over which to discontinue your use after which the use has to be terminated \(\rightarrow\) solves constitutional concerns over takings
  - How do you determine what a reasonable amount of time is?
    - Nature of the use
- How much has property owner invested?
- Number and kinds of improvements
- What public detriment has been caused by the use?
- What is character of surrounding neighborhood?
- How long will it take to amortize the investment? (get money back)

○ For nonconforming use to get benefit of amortization, it must be ACTUAL, EXISTING
  - Can’t be something you intended, hoped to do

○ Alternative bases on which to argue you for right to continue nonconforming use
  - Vested right: once right has become vested, gov cannot take it away
    - May be out of a planning stage
  - Estoppel: gov’t should be estopped from prohibiting me or my use once I have made reasonable investments on reliance (permission to build, etc)
  - Diff b/t vested rights and estoppel:
    - Estoppel may be stronger when it comes to planning b/v ind may have a vested right based on some preexisting use that applies to everyone (general act of gov) → diff than when gov specifically acts for you
    - If gov takes away your right under estoppel, gov may be reneging

○ Other ways to deal with nonconforming use:
  - Let them fade away – eventually will go away. (doesn’t work)
  - Forbid maintenance and repair → comm. believes will make them go away
    - Instead, well-maintained nonconforming use becomes shabby noncf

○ Mechanics
  - Right to engage in nonconforming use runs with land
  - Nonconforming use can or will be terminated upon abandonment
  - Nonconforming use cannot be expanded or changed
    - Continuation of use versus a new use
    - Incrementally, a little change is okay but taken all together, it’s bad
  - Nonconforming use vs nonconforming buildings → longer periods of amortization for buildings than for use (harder to move, more invested)

○ Other notes
  - Expectation and reliance interest
  - Encourage investment – put land to productive use to have a takings claim
  - Endowment affect: what if I am involved, invested in my land?
  - First-in-time philosophies

○ Difference b/t future use and present use when it comes to taking?
  - Even if I am not using my right, I still have a right to it – must pay me.

• Variances: flexibility in zoning
  ○ Permission to vary from the zoning requirement
    - Administrative agencies can impose reasonable conditions on granting a variance so long as it does not have too much adverse impact (variance runs with the land)
    - Use variance: relax restrictions on your use of your land
    - Area variances: build house on smaller lot size than allowed
  ○ Special exceptions: uses permitted by zoning ordinance in which a zone in which it is not necessarily incompatible but where it might cause harm if not monitored. Exceptions are generally built into the ordinance.
- Authorized under conditions when they are compatible with surrounding uses
- Deal w/ anticipated changes up front and contemplate when making ord
- Zoning amendments or spot zoning: when there is not an exception, apply to zoning board and try to exception get or try to get the use of just your property rezoned (spot)
  - Problems w/ spot: may defeat purpose of zoning to begin with
  - How to solve:
    - Show a mistake in original zoning ordinance
    - Show some sort of change in circumstances for it to work
- Two ways rezoning takes place
  - Landowner gets his parcel rezoned so he can do something
  - Try to get somebody else’s property so they can’t do something
- Re spot: is agency doing legislative or judicial?
  - Courts show a lot of deference to legislative acts
  - Courts do not show as much respect for lower court judicial
- Variance should be granted when the strict application of the zoning ordinance would result in undue hardship on the developer of the land → mo effective use of land could be made if variance is denied
  - Property owner must make effort to help himself
    - If you haven’t tried to solve it, maybe it’s not such a problem
    - Only want to help people who help themselves
    - No undue hardship if you didn’t try to help yourself
    - Don’t want to make variances too easy
- Market-based alternative: might be denied on the condition that neighbors buy property from the owner at fair market value (value of the property if variance were granted)
- Exclusionary zoning
  - Rich people impose zoning ordinances to keep poor people out → i.e. minimum lot sizes, room requirements, etc
  - Method of restricting entry into a community by particular people; close a community to unwanted groups by limiting land’s use → pre-text?
  - Mt. Laurel: fiscal reasons often motivate exclusionary zoning in addition to discrim
    - Low property taxes = higher property values
    - Wealthy residents and low demand for public services
    - Each small community is still responsible for its fair share of the region’s housing requirements (for marginalized folk, etc.)
      - Account for general welfare
  - Benefits? Vote with your feet → go to the community that offer what you want
  - No exclusionary zoning: creates more diversity
  - Why might developed communities be different from developing communities?
    - Developing communities may have more flexibility
    - Endowment affect: property as personhood in developed community
    - Expectations already ingrained in developed community

Takings
- Eminent domain
  - Gvmt forces transfer of private property from property owner to the gvmt; ind. property rights are protected by liability rule, not property rule.
• Taking Clause: 5th Amend.
  o “nor shall private property be taken for public use w/o just compensation”
• Posner’s explanation: eminent domain is needed to get around transactions costs
  o Gvmt must be able to abrogate property that is needed for some purpose; way for gvmt to solve land assembly problems in a high transactions costs environment
• Public use requirement: may not condemn property for private purposes, even if willing to pay; need only be some advantage or benefit to the public; actual use, or right to use, is by the public; SC has settled this question by adopting broader view
  o Alternate views: public use test should require that there be a real, pressing need, as opposed to a mere convenience, for gvmt to exercise its power
  ▪ Transactions costs: tests should be formulated so that public use should be applied only in such a way to endorse condemnation in such a way when transactions costs are sufficiently high to thwart those costs.
• Leading cases on PUBLIC USE
  o Hawaii Housing Authority v. Midkiff: land redistribution program in Hawaii where land was transferred to tenants upon payment to landlord
  ▪ SC hold that it is a public use, that taking was part of state’s police power, falling to the decision of the state → test = whether the exercise of eminent domain power is rationally related to some conceivable public purpose
  o Pulltown Neighborhood Council v. City of Detroit: taking by city of homes in a residential neighborhood for transfer to GM so GM could build a new plant
  ▪ Court held that promotion of the economy (GM would create jobs, etc) was sufficient public use even though GM was a private company.
  o City of Oakland v. Oakland Raiders
  ▪ SC dicta: approved taking of Raiders team on grounds that it would keep jobs in the community; sufficient public use b/c team poses benefit to economy
• Just compensation
  o Efficiency: ensures that gvmt values the property it is taking more than the person it is taking property from
  o Incentives to be productive: if there is no compensation requirement, people may be afraid to make investments in property b/c gvmt can just take it
  o Restrains the state: requiring gvmt to compensate property owners can have effect of restraining owners from just coming around and taking property at will
  o Fairness/justice concerns
  o Might protect the powerless: protect people who do have a meaningful voice
  o May protect powerful and wealthy: avoids risk that gvmt would use eminent domain to redistribute the wealth
  o What are the problems with just compensation, why people don’t like it?
    ▪ Does not consider property owner’s subjective value
      • Efficiency/social welfare problem if subjective is not included; gvmt does not value it as much and gets to buy it on the cheap
      ▪ Gvmt taking stuff is inherently unjust, regardless of compensation
    o Why might someone value property more than market
      ▪ Endowment effect
      ▪ Property owner’s special use of property might be more valuable than gov
- Relocation costs: expensive to move
- Radin: personhood value
  - Why don’t we award personal value?
    - Administrative problems \(\rightarrow\) too hard to calculate personal value
    - People might lie about personal value
    - May cost taxpayers more money
  - If problem is administrative, what can we do about it?
    - Give some kind of bonus above the market value
    - Heighten public use test \(\rightarrow\) make it for a really meaningful public purpose if there is a high personal value

- Loretto v. Teleprompter Manhattan CATV (permanent physical invasion)
  - When action is a permanent physical occupation authorized by the gvt it is considered a taking, regardless of the minor extent of the taking or the public interest it serves; level of taking affects amount of compensation not whether or not it is a taking; temporary occupations of land may or may not be a taking
  - Should rent control be considered a permanent physical occupation?
    - Could be physical b/c people are there who you may not have rented to
    - Not a taking: just a regulation; still have right to sell, change land, etc.
    - Right to exclude: (PP) forced to take a tenant at a reduced price?

- Regulatory takings
  - Denominator problem: how do we measure diminution in value? Measure it against the specific interest or the total interest possessed?
  - When should I be compensated?
    - When the regulation takes away one stick.
    - When my land is physically occupied.
    - When regulation diminishes value to the point it would be unjust not to compensate
  - Pennsylvania Coal: conceptual severance test: what is the denominator? Holmes and Brandeis \(\rightarrow\) all that you have in bundle as compared to what we take
    - Diminution in value: when it reaches a certain magnitude, there must be an exercise of eminent domain to sustain the action
      - Justice/fairness: guard disproportionately burdensome losses
      - Efficiency: (1) protects property owner’s expectations; (2) balancing helps insure that public gains from regulation outweigh private losses
    - Average reciprocity of advantage: regulation will sometimes benefit and sometimes burden a particular landowner
    - Balancing with regulatory taking: value of right taken is greater than the public benefit and the average reciprocity of advantage
  - Keystone: Look at the character of the gvt action \(\rightarrow\) gvt showed a large public benefit in the form of health, environment and fiscal, more meaningful than Penn Coal; although everyone is burdened, they benefit greatly from restrictions also
  - Penn Central: (1) investment-backed expectations, (2) character of gov action, (3) ability of aggrieved party to transfer interests
    - Why weren’t P’s right’s interfered with? (1) does not interfere with P’s ability to use land for its original purpose, train station, (2)P can still profit from
(3) some development is okay, if it complies with requirements and (4) P can transfer its air rights to other property
- Dissent: avg reciprocity of adv: only a few buildings were singled out to bear responsibility w/o a benefit; majority says all benefit from preservation
- What are “distinct investment-backed expectations”?
  - What does owner have before/after regulation?
  - When owner has already made some investment
  - Nollan: the exaction (condition) imposed must have a reasonable nexus with legitimate state power, condition must substantially advance legitimate state interests and not deny an owner economically viable use of his land; gov't cannot require person to give up constitutional right in exchange for benefit that has little relationship to property
  - Dolan: there has to be a “rough proportionality” b/t the condition imposed and the impact it has on the community
  - Lucas: Categorical takings rules that when the value of the land is essentially wiped out so there is no economically viable use of the land as a result of the regulation = taking
    - Total wipe out = physical appropriation (gov't takes prop and denies effective use of it); avg rec of adv prob – P gets nothing; not a burden to compensate b/c wipe outs are pretty rare;
    - Carve out to wipe out rule: NUISANCE → if you don’t have a right to do something anyway, then gov't owes you nothing on account of wipe out
  - Two views of takings: (1) protect land-owners and (2) a tool to restrict gov't
- Under takings – go back and look at zoning notes, p115
  - Has anything been taken if you reasonably anticipated it?